No. 13047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellee.

REPLY BRIEF OF APPELLEE, STANDARD ACCIDENT INSURANCE COMPANY.

FULCHER & WYNN,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases

Textbooks

No. 13047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellee.

REPLY BRIEF OF APPELLEE, STANDARD ACCIDENT INSURANCE COMPANY.

Preliminary Statement.

The opening briefs of the Appellant Standard, and cross-appellant, Vivian Winget, appear adequately to present the facts involved and we will therefore proceed at once to reply to Winget's argument upon her appeal.

The propositions advanced by Winget are as follows:

1. Although the policy of Standard limits its liability for injuries to any one person to $10,000.00, Winget should be entitled to recover a greater amount since the total judgments awarded to all persons injured in the accident exceed $20,000.00, the limit of Standard's liability to more than one person arising out of any one accident; and

2. Conceding that Winget's judgment against Towry, the assured, exceeded any possible liability of Standard under the policy, Standard should nevertheless be held for interest upon the total amount of Winget's judgment.

We will reply to these arguments in order.

1. Standard's Insurance Contract Limits Its Liability for Damages Arising Out of Injuries to Any One Person to a Maximum of Ten Thousand Dollars.

For the convenience of the court we quote the pertinent provisions of the insurance policy [Winget's Exhibit 4, which has not been reprinted in the Transcript of Record]. These portions of the policy are contained in the face sheet entitled "DECLARATIONS", in paragraph I of the INSURING AGREEMENTS appearing on page 2, and in paragraph 1 of the "CONDITIONS", page 3 of said policy.

Paragraph VI of the DECLARATIONS provides:

> "THE INSURANCE AFFORDED IS ONLY WITH RESPECT TO SUCH AND SO MANY OF THE FOLLOWING COVERAGES AS ARE INDICATED BY SPECIFIC PREMIUM CHARGE OR CHARGES. THE LIMIT OF THE COMPANY'S LIABILITY AGAINST EACH SUCH COVERAGE SHALL BE

AS STATED HEREIN, SUBJECT TO ALL OF THE TERMS OF THE POLICY HAVING REFERENCE THERETO.

COVERAGES	LIMITS OF LIABILITY	POLICY NO.	PREMIUM
(A) Bodily Injury Liability	$10,000 Each Person $20,000 Each Accident	J 894065	$20.70
(C) Medical Payments	$2,000 Each Person—(Named Insured Included)"		7.00

Upon page 2 of the Policy it is provided that Standard:

"Agrees with the insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the Declarations and *subject to the limits of liability,* exclusion, *conditions* and other terms of this policy: (Italics supplied)

INSURING AGREEMENTS

"I. *Coverage A—Bodily Injury Liability*..... To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Turning next to the CONDITIONS of the Policy on page 3 the limits of liability quoted above are defined as follows in section 1:

"*Limits of Liability—Coverage A* . . . The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the com-

pany's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident, the limit of such liability stated in the declarations as applicable to "each accident" is subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

We respectfully call this court's attention to the language of the second clause of Section 1 of the Conditions quoted above, dealing with the limit of Standard's liability as to any one accident. Here it is provided that "subject to the above provisions respecting each person" the total liability for all damages arising out of injuries sustained by two or more persons may not exceed $20,000.

We submit that the quoted language of the policy makes it perfectly clear that Standard assumed no liability in any event for damages arising out of injuries to any one person in excess of the sum of $10,000, regardless of whether or not damages were also imposed upon the assured because of other injuries.

Certainly if Winget had been the only person injured in the accident who had recovered judgment against Towry, she could not claim more than $10,000. This is conceded by Winget in her opening brief on page 12.

Winget argues however that since more than one person was injured in the accident her situation is improved. She asks the court to disregard the first clause of Section 1 of the Conditions, "*Limits of Liability,*" and to hold

that whenever more than one person is injured the insurer becomes responsible for the limit of $20,000, which is the maximum fixed for any one accident.

We contend that the simple, direct and complete answer to this argument is that the policy does not so provide.

Under the terms of the policy Standard may be responsible for damages as the result of injuries sustained by any one person to a maximum amount of $10,000 and SUBJECT to this limitation may be liable for a maximum of $20,000 for the total damages arising out of injuries to more than one person as the result of any one accident.

Appellant Winget, in her opening brief referred to the authorities which we submitted to the trial court and upon which such court relied in arriving at its decision as to the limit of Standard's liability.

We refer to 7 Couch Cyclopedia of Insurance Law, Section 1871, page 6232, reading as follows:

> "Under a provision limiting liability on account of one person to $5,000.00, with a limit of $10,000.00 where more than one person has been injured, subject to the same limitation for each person, recovery cannot be had in excess of $5,000.00 for injury to one person." (Citing McClung v. Pennsylvania Taximeter, etc., 25 Pa. Dis. Rep. 583.)

We call attention to the fact that in the case at bar, the policy of Standard limited its liability on account of injury sustained by one person to $10,000.00, with limit of $20,000.00 where more than one person might be injured in an accident SUBJECT to the same limitation for each person.

We also cited to the court below and rely on this appeal upon the case of *Mannheimer Brothers v. Kansas Casualty Co.* (Minn. 1921), 184 N. W. 189. In this case it appears that two persons had been injured by a truck owned and operated by plaintiffs. These injured persons brought suits, one recovering a judgment against the insured, Mannheimer Brothers, for more than $12,000.00, and the other recovering a judgment for more than $2,-500.00. The insurance company in that case had in force an automobile liability policy, with limit of $5,000.00 for damages arising out of injury to one person and with a limit of $10,000.00 for damages resulting from injuries to two or more persons as a result of any one accident. After the insurer had denied any liability the insured, Mannheimer Brothers, paid in full the amount of the smaller judgment and recovered this payment from the insurer. Subsequently, the first and larger judgment was affirmed on appeal. The insured then paid that judgment and brought the reported action to recover the sum paid by it which was sustantially in excess of $5,000.00. The defendant insurer contended that the limit of its liability was $5,000.00.

The policy involved provided:

> "The Company's liability under Paragraph 1 of the insuring agreements, on account of bodily injury to or death of one person, is limited to $5,000.00 and subject to the same limitation for each person the Company's total liability on account of bodily injuries to or death of more than one person as the result of one accident, is limited to $10,000.00."

The Minnesota Court then held:

> "It follows therefore that the liability of defendant under the terms of the contract above quoted is limited to $5,000.00 for each person injured and the trial court was right in so holding. This disposes of plaintiff's further point that since in the Hanscom case the full $5,000.00 was not used in paying his claim, plaintiff may claim the balance to the full amount of the insurance of $10,000.00. To grant that condition would also amount to a judicial remodeling of the contract."

Each of the authorities cited above are referred to by appellant Winget on page 17 of her brief, but we find therein no attempt to distinguish these decisions from the facts presented in the case at bar.

The only other authorities cited by said appellant Winget on this point are found on pages 16 through 21 of her brief. The first case is that of *Hobson v. Mutual, etc. Assn.* 99 Cal. App. 2d 330; (221 P. 2d 781) which holds only that in construing an insurance policy, a construction most favorable to an insured should be adopted. The case next cited is *Perkins v. Firemens Fund Ind. Co.,* 44 Cal. App. 2d 427; (112 P. 2d 670). As appellant Winget points out, this case did not discuss the matter of proration but held simply that the award made to an injured person for her injuries and the consequential damage award made to her spouse must be regarded together as damages arising out of injury to one person. Said appellant next cites *William v. Standard Accident Insurance Co.* without supplying a citation to any official report, but on page 18 states that the conclusion of the court was the same as in the *Perkins'* case. To the same

effect are the cases of *Employers Liability Assur. Corp.*, 156 So. 447 and *Lumbermen's Mutual Casualty Co., v. Yeroyan,* 5 A. 2d 726.

In addition to the foregoing authorities, Winget cites on page 20 the case of *Olds v. General Accident, etc., Corp.,* 67 Cal. App. 2d 812, (155 P. 2d 676) but only to the point that the injured person suing the insurance company is not bringing an action to recover a loss suffered by him under the policy. This may be conceded but it is elementary that his claim upon the policy is measured by the terms thereof.

The last authority cited by said appellant is the case of *McNulty v. Connecticut Mutual Life Ins. Co.,* 46 Fed. 305. We submit that the cited case is in no respect analogous to the case at bar, since there the court was considering only conflicting claims of two persons to the net proceeds of a life insurance policy.

In her argument the appellant Winget concedes that regardless of how much her judgment against Towry might exceed $10,000.00, the latter amount would be the limit of her recovery against Standard if no one else had been injured in the particular accident and had recovered a judgment therefor. (Appellant Winget's Opening Br., p. 12.) She nevertheless contends that if some other injured person should obtain a judgment likewise exceeding the sum of $10,000.00, suddenly the liability of the insurer is no longer limited to $10,000.00 on account of each injured person but becomes an indivisible liability in the total sum of $20,000.00, which the court must distribute.

Perhaps the simplest reply to this contention is by posing the counter question, Why?

There is no language in the Standard policy supporting such a theory. On the contrary, Standard in simple language has limited its liability to $10,000.00 for damages arising out of injury to one person and subject to that limitation, has gone further and provided that if more than one person shall have been injured, the total damages for which Standard shall be liable shall not exceed $20,000.00.

Determination of this question of Standard's limitation of liability should dispose of this phase of the Winget appeal and we therefore refrain from any discussion as to whether the trial court erred in denying injunctive relief and as to what method or principles should have been employed if Winget were entitled to a recovery exceeding $10,000.00.

2. Standard Is Responsible for Interest Only on Its Share of the Judgment Against Towry.

Appellant Winget quotes on pages 31 and 32 of her opening brief the policy provisions upon which she relies to support her claim that she is entitled to recover interest from Standard upon the total amount of her judgment against Towry. At the same time she, of course, concedes that under no circumstances would Standard be liable for the entire principal amount of such judgment.

The language so quoted by said appellant is found on page 2 of the policy and is contained in Paragraph II of the INSURING AGREEMENTS.

We submit that the answer to her contention will be found in reading this portion of the policy.

We respectfully point out that in the opening sentence of said Paragraph II of the policy, the obligations assumed in the subdivisions thereof are qualified and limited by the following language:

> "As respects such insurance as is afforded by the other terms of this policy under Coverage A . . ."

Thus the assumption in subdivision (b) of responsibility to pay all interest accruing after entry of judgment is limited to the insurance afforded by the policy, which insurance we have previously shown is limited to the sum of $10,000.00 for damages arising out of injuries to one person. All of the supplemental and additional benefits assumed in paragraph II are referred to such amount of insurance as is otherwise provided by the policy.

Appellant Winget argues that the concluding sentence of said paragraph II expresses a further assumption of liability. We submit that such language only serves to make clear that Standard's obligations already assumed in said paragraph for costs, interest and other expenses are obligations assumed in addition to the specified limits. The addition of this last mentioned sentence of paragraph II does not purport to extend the liability assumed in said subdivision (b) relating to interest.

In this light, the authorities cited and relied upon by us in the District Court must control.

Sampson v. Century Indemnity Co., 8 Cal. 2d 476; (66 P. 2d 434), presented to the Supreme Court of California precisely the same claim presented by appellant Winget herein.

While the California Supreme Court observed that the entire policy of insurance was not before it, the court set

forth in its opinion part of the terms thereof and for the convenience of this court we have quoted below the provisions of the policy involved in the *Sampson* case in one column, setting forth in the other the provisions involved in the case at bar.

Sampson Case	Case at Bar
"to pay all costs . . . also all interest accruing after entry of judgment, until the company had paid, tendered, or deposited in Court such part of such judgment as does not exceed the limit of the company's liability thereon . . ."	"pay . . . all interest accruing after entry of judgment until the company has paid, tendered or deposited in court, such part of such judgment as does not exceed the limit of the Company's liability thereon, . . ."

In the *Sampson* case the only contention made on the part of the assured was that the insurer was liable for legal interest, not only on the principal sum which it was compelled to pay under the policy but on the entire amount of the judgment.

After referring to the language of the policy quoted above, the court held on page 480 of the official report as follows:

> "'All interest,' as used in the provision above quoted, means all interest on that part of the judgment for which the company was liable, and not all interest on the entire judgment as contended by the appellant. To construe this provision to mean that the company had agreed to pay the interest to become due on that part of the judgment which the company was not legally liable to pay would be an unnatural and strained construction of this provision of the policy. In our opinion, the only fair and

> reasonable inference to be drawn from this provision of the policy when considered with its other terms is that the company was to pay interest after judgment only upon that part of the judgment for which it was liable. So construed there is no ambiguity or uncertainty in the terms of the policy and therefore, the rule of construction contended for by appellant has no application."

The only suggestion made by appellant Winget that the *Sampson* case does not control is the fact that in the *Sampson* opinion it does not appear whether or not the policy contained a provision that the payments of interest were to be in addition to the applicable limit of liability under the policy. We reply by pointing out that in the *Sampson* case, it was conceded that the insurer was liable for and had paid interest on the amount of the judgment for which it was responsible, just as in the case at bar it is conceded that if Standard is responsible to Winget for the sum of $10,000.00 it is likewise responsible for interest on said sum from the date of the original judgment.

We also submit the decision in *Malmgren v. Southwestern Automobile Insurance Co.,* 126 Cal. App. 135; (14 P. 2d 351). In that action the plaintiff and his wife had both filed actions against one Eddy for damages resulting from bodily injuries sustained by the wife as a result of an automobile accident. The defendant insurance company paid a final judgment recovered by the wife by payment of the total sum of $5,367.50, principal and

interest, plus $19.75 costs under the terms of a policy providing:

> "The company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to $5,000.00. . . ."

The policy provided further that:

> "The expenses incurred by the company in defending any suit, including the interest on the verdict or judgment and any costs taxed against the insured, will be paid by the company irrespective of the limits expressed above."

The plaintiff husband who had likewise recovered a judgment against the assured, then brought this action to recover legal interest on the amount of his unpaid judgment, basing his claim on the policy provisions above quoted.

We respectfully direct this court's attention to the language contained on page 140 of the official report as follows:

> "Appellant would have us construe the clause of the policy relating to interest to mean that despite such payment in full to appellant's wife, respondent was also liable for interest on appellant's judgment against the assured 'irrespective of the limits' of the policy. We cannot agree with this construction for we are of the opinion that the 'interest on any verdict or judgment' which the company agreed to pay 'irrespective of the limits expressed above' had no reference to interest on the principal sum of any judgment for which principal sum the company was not in any manner liable. 'Interest is the compensation allowed by law or fixed by the parties for the

use, or forbearance, or detention of money.' (Civ. Code, sec. 1915.) The only logical construction to place upon the word 'interest,' as used in the above-mentioned policy, is that it referred only to interest accruing on the principal sum of a judgment for which respondent was liable under the terms of the policy. To interpret the policy in accordance with the contention of appellant would lead to the absurd result of rendering respondent liable indefinitely for the payment of the accruing installments of interest upon an obligation of a third person for which obligation respondent was not in any manner liable. We do not believe that the rule of strict construction against the insurer may be invoked to sustain such an unreasonable construction."

Conclusion.

This court will of course bear in mind that Standard concedes no liability whatsoever to plaintiff herein and is in fact prosecuting its appeal to this court from a judgment in favor of Winget in the sum of $10,000.00, plus interest thereon and plus costs. The purpose of this brief is to establish that under no circumstances will Standard be liable for any sum greater than the sum of said judgment.

Respectfully submitted,

FULCHER & WYNN,

By CAROL G. WYNN,

Attorneys for Appellee.